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No. 82-1150

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1983

HOWARD ELLIS, *et al.*,
*Petitioners,*
v.
BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, *et al.*,
*Respondents.*

ALLEN L. FAILS, *et al.*,
*Petitioners,*
v.
BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, *et al.*,
*Respondents.*

**On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## BRIEF FOR RESPONDENTS

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## BRIEF FOR RESPONDENTS

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## STATEMENT OF THE CASE

### A. Proceedings In The District Court

#### 1. *Proceedings on Plaintiffs' Political Expenditures Objection*

In 1973, the complaints herein (A. 5-22 (*Ellis*) and A. 78-96 (*Fails*))[1] were filed for 196 employees of Western Airlines required to pay union dues to the Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees (hereafter "BRAC" or "the Union")[2] pursuant to a union security agreement between Western Airlines and the Union. The complaints chiefly asserted a claim that plaintiffs' (the petitioners in this Court) dues payments were being used by the Union for *political* purposes, in violation of the First Amendment and the Railway Labor Act.

On January 6, 1975, in denying a motion by the Union for summary judgment the district judge ruled (CR 86) that the Union's limited political rebate plan was based on a standard "erroneous as a matter of law" as to the amounts to be rebated. On October 6, 1975 the Union's Executive Board adopted a political-ideological expenditures deduction system (A. 345, 425-426), which is comprehensive in its coverage, generous in the amount of the dues deduction provided, and in terms retroactive to the

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[1] "A." refers to the Joint Appendix in this Court. "Pet. App." refers to the Appendix to the Petition for Certiorari, containing opinions and orders of the courts below. "Pet. Br." refers to the Brief for Petitioners in this Court. "CR" references are to the *Ellis* docket in the district court; the docket of the consolidated *Fails* case includes parallel entries not here cited. "RT" references are to the reporter's trial transcript unless a date is specified, in which case the RT reference is to the transcript of the hearing of that date.

[2] The defendants were BRAC, one of its System Boards of Adjustment, and three of its Local Lodges.

original date of any employee's first protest. Deductible items—which have in recent years been identified as comprising about five percent of the total dues dollar—include not only disbursements for political and ideological activity, but also all legislative and lobbying costs (whether or not germane to collective bargaining), all charitable donations, and all fees for affiliations with other labor organizations (A. 421-424). The legal status of that system was not resolved until the district court issued its findings and conclusions after a trial held in 1978. At that trial there was extensive testimony by officials concerning the ongoing operation of the Union's deduction system (RT 795-99, 909-15, 960-1012, 1051-57). The ultimate finding of the district court was that plaintiffs' right of abstention from financial support of union political and ideological activity is fully protected by BRAC's system (Pet. App. 34a, ¶¶ 4, 5 quoted at pp. 9-10, *infra*). The final judgment also requires the annual reduction of plaintiffs' dues obligation by the amount of the prior year's political and ideological expenditures ratio determined under the Union system (Pet. App. 34a, ¶ 3).

### 2. *Proceedings on Plaintiffs' Operating Expenditures Objection*

In a summary judgment motion filed on August 26, 1975, plaintiffs asserted that objecting employees cannot be required to provide financial support for various union operating expenditures, contending that the making of such expenditures is not part of "collective bargaining" or "grievance administration."

On January 21, 1976, the district court issued "Findings of Undisputed Facts and Conclusions of Law" (Pet. App. 17a-26a) declaring that several areas of Union activity—identified in ¶ 22 of that court's findings (Pet. App. 22a)—constitute "non-collective bargaining activities" not includible in a union shop agreement authorized by the Railway Labor Act (Pet. App. 24a, ¶¶ 5,

6). On November 29, 1976, that court "clarif[ied] its earlier ruling so as to delimit the scope of costs chargeable against plaintiffs to those of negotiating and administering collective agreements, and the costs of the adjustment and settlement of disputes incurred by the defendants in the representation of plaintiffs *with Western Airlines*" (Pet. App. 28a, original entirely italicized).

Among the major activities exempted by ¶ 22 from the union shop obligation were: *the Union's quadrennial national convention; union publications that include general news or entertainment material; the defense or prosecution of litigation not having as its subject contract negotiation or administration; BRAC's death benefits program, which covers all represented employees; social and recreational activity; and organizing of additional employees of the same or other employers.*

**3. *The Trial***

Under a pretrial order issued on April 11, 1978 (A. 255-266), the trial issues were significantly narrowed. The Union agreed (A. 261-262) that if ¶ 22 were ultimately judicially sustained, the Union would return to plaintiffs all their dues payments to the Grand Lodge between 1972 and 1975. Accordingly, the focus of the 1978 trial evidence concerning the Grand Lodge was confined to the years 1976 and 1977, for which data were more readily available. It was further agreed that there would be no relitigation of the legality of the rulings in ¶ 22. Under an additional pretrial order provision, placing the burden of proof upon the defendant Union to demonstrate the proportion of its budget expended on ¶ 22 items, it was the defendants who presented their case first at the trial.

Officials of the three defendant Locals in this case produced all their relevant books and records and testified in detail concerning all disbursements made and all Union activities undertaken on a compensated basis (RT 163-

231, 313-53, 370-89, 424-64, 484-517). They demonstrated that the total of the expenditures of their Locals for ¶ 22 items (other than those already encompassed in the Union's dues deduction system) is minuscule both in significance and amount. Typically such outlays are for refreshments at the monthly Local meeting or for flowers sent to the bereaved relatives of a deceased employee (e.g., RT 213-16, 380-83, 458-62). As a percentage of the Local dues, these and all other ¶ 22 outlays in 1977 represented, *in toto*, 2.4%, 1.2%, and 0.3% of disbursements by Local Lodges 3014, 3001 and 3049 respectively (RT 213-16, 380-82, 458-64, summarized for CR 297 Att. I). A similar result obtained in the defendant System Board; in 1977 its ¶ 22 outlays represented less than 1% of its total expenditures (RT 633-48, 722-29).

The Grand Lodge figures were significantly higher. Defendants' itemized calculations show that some 40% of total Grand Lodge outlays in 1976 and 37.8% of its total outlays in 1977 went for the activities covered by ¶ 22 (Def. Trial Exhibits B (reproduced at A. 401) and C). The Grand Lodge calculations were confirmed by the Union's President, its Secretary-Treasurer, and its Comptroller. They testified in detail to each of the 66 separate line items appearing in Exhibits B and C which encompassed all of the Grand Lodge's annual outlays.

In response to the testimony of defendants' witnesses, plaintiffs, who had engaged in extensive pretrial discovery, produced only three witnesses of their own, two of whom were accountants objecting to the absence of a standardized system of bookkeeping allocating Union outlays by ¶ 22 functions. The district judge, however, expressed the view (RT 802-03) that the Union should not be expected to alter its bookkeeping system until ¶ 22 of his ruling was affirmed on appeal. That is the view to which the district court adhered in framing its final orders (Pet. App. 3a, ¶ 10).

#### 4. *The Opinion and Judgment of the District Court*

The district court's opinion, expressed in its "Findings of Fact and Conclusions of Law" issued on March 14, 1980, accepted defendants' proof that at the local and intermediate levels of the Union there are only minimal expenditures on ¶ 22 items, whereas about 40% of the outlays of the Grand Lodge are for ¶ 22 items (Pet. App. 31a-32a, ¶¶ 7-12.) These rulings were incorporated in the judgment entered on July 7, 1980 (Pet. App. 33a-35a).

### B. Proceedings in the Court of Appeals

On plaintiffs' appeal the court of appeals unanimously rejected their contentions: (A) that BRAC's present political-ideological expenditures deduction system is illegal; (B) that the district court should have required the defendants to establish by "clear and convincing evidence" the proportion of nonchargeable expenditures to total expenditures; and (C) that the district court erred in accepting BRAC's books and records, which plaintiffs claimed do not satisfy generally accepted accounting principles and should have been organized according to the categories first articulated in the district court's ¶ 22 ruling (Pet. App. 5a-8a).[3]

On the Union's appeal, the court of appeals, with one Judge dissenting, reversed the district court's ruling that the ¶ 22 expenditures are not chargeable to plaintiffs (Pet. App. 9a-13a). The court of appeals concluded that "each of the challenged expenditures can be seen to promote, support or maintain the union as an effective collective bargaining agent and therefore such expenditures are germane to the work of the union in the realm of collective bargaining" (Pet. App. 13a-14a).

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[3] The court of appeals also rejected claims of procedural error asserted by plaintiffs but not renewed here (Pet. App. 8a-9a).

## INTRODUCTION AND SUMMARY OF ARGUMENT

I. The court of appeals in rejecting the argument of the objecting employees "that they cannot be charged for certain major operating expenditures of the union * * * [that are] not 'political' or 'ideological' " (Pet. App. 3a, 4a), held:

> [T]he relevant inquiry is whether a particular challenged expenditure is germane to the union's work in the realm of collective bargaining. This formulation respects and protects dissenters' rights, but does not needlessly weaken the union, whose viability is necessary to secure and maintain industrial peace. [Pet. App. 10]

That holding, which is based on this Court's decisions in *Railway Employes' Dept. v. Hanson*, 351 U.S. 255 (hereafter *"Hanson"*), *Machinists v. Street*, 367 U.S. 740 (hereafter *"Street"*), *Railway Clerks v. Allen*, 373 U.S. 113 (*"Allen"*), and *Abood v. Detroit Board of Education*, 431 U.S. 209 (*"Abood"*), accurately reflects Congress' intent in enacting §2, Eleventh of the Railway Labor Act and is entirely consistent with the First Amendment's requirements.[4] For Congress' purpose was to further perfect a system for the "self-adjustment of the [railroad and airline] industry's labor problems between carrier

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[4] The first three of these cases, like the present, involve employees and labor organizations subject to the RLA. The Constitution was held to apply to union security agreements made pursuant to that statute, because the RLA provides that such an agreement is lawful "[n]otwithstanding any other provisions * * * of any other statute or law * * * of any State" (§ 2, Eleventh). A union security agreement made pursuant to the RLA, therefore, by force of the Supremacy Clause of Article VI of the Constitution, cannot be invalidated by any state law. *Hanson*, 351 U.S. at 232. This differentiates the RLA from the National Labor Relations Act, § 14(b) of which provides that state laws prohibiting union security agreements are *not* preempted by the NLRA. See *Abood*, 431 U.S. at 218, n.12. In *Abood* itself the Constitution was applicable because a *state* agency was a party to the union security provision and the payment required by that provision was a condition of continued public employment.See *id.* at 226.

organizations and *effective labor organizations.*" *Street*, 367 U.S. at 759, emphasis added. And Congress understood that effective labor organizations, like all ongoing organizations, incur a wide range of operating expenses, and therefore concluded that the cause of labor peace would be furthered by permitting arrangements whereby all represented employees make an equal financial contribution not to some artificially segmented portion of their exclusive representative's activities but to all of the activities that enable the representative to play its appointed role in the industrial relations system established by the RLA. The *Hanson* line of authority, in turn, shows that Congress' purpose in this regard does not impose an unconstitutional burden on objecting employees.

II. The record demonstrates that the court of appeals correctly concluded that each of the six classes of national union operating expenditures challenged here is "germane to the union's work in the realm of collective bargaining." With respect to Grand Lodge organizing, it is particularly to the point that this Court has for half a century recognized that organization is imperative to eliminate the adverse effects of substandard wages, to make collective bargaining effective and to maintain the standards achieved through such bargaining. Additionally, petitioners' contention that only expenditures for collective bargaining and grievance handling with the objecting employee's employer are chargeable cannot be reconciled with Congress' special concern for the financial needs of *national* unions.

III. Petitioners' standard-of-proof contention—that the defendant union must establish by "clear and convincing evidence" the portion of its budget expended on items not chargeable to objecting employees, and the corollary of that argument, that the trial court should have required BRAC to produce accounting records categorized according to those items—is based on their asserted First Amendment interests. That contention overlooks the recognition in *Street*, *Allen* and *Abood* that the rights of the *non-objectors* and of the objectors must be given

equal weight in determining the dues obligations of each. Accordingly, the preponderance-of-the-evidence standard was correctly applied: "Any other standard expresses a preference for one side's interests," *Herman & MacLean v. Huddleston*, —— U.S. ——, 51 L.W. 4099, 4103 (January 24, 1983). Moreover, petitioners' theory is supported by none of the cases they cite, and is squarely refuted by *Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 274. Petitioners' criticism of BRAC's accounting records is without merit also because those records were endorsed by the two courts below in determining the proportion of nonchargeable expenditures from those records and unimpeached supporting testimony. More fundamentally, petitioners' argument is inconsistent with *Allen* where this Court said: "Absolute precision in the calculation of such proportion [of political to total union expenditures] is not, of course, to be expected or required; we are mindful of the difficult accounting problems that may arise." 373 U.S. at 122.

## ARGUMENT

### I. The "Germane to the Union's Work in the Realm of Collective Bargaining" Standard Adopted by the Court of Appeals from *Railway Clerks* v. *Allen*, 373 U.S. 113, Fulfills the Objectives of § 2, Eleventh of the Railway Labor Act and Meets the Constitution's Requirements

(a) *Abood* summarizes the two basic legal propositions settled by this Court in *Hanson* and its progeny and states the question, not yet squarely answered, posed by this case.

First, the union shop as such is constitutional:

> To compel employees financially to support their collective bargaining representative has an impact upon their First Amendment interests. An employee may very well have ideological objections to a wide variety of activities undertaken by the union in its role as exclusive representative. • • • But the judgment clearly made in *Hanson* and *Street* is that such interference [with these First Amendment in-

> terests] as exists is constitutionally justified by the legislative assessment of the important contribution of the union shop to the system of labor relations established by Congress. [*Abood*, 431 U.S. at 219, 222.]

Second, one certain limit to the union shop, established in *Street* and reaffirmed in *Allen* and in *Abood*, is that § 2, Eleventh of the RLA and the First Amendment require that "funds for the [union's] expression of political views, on behalf of political candidates, or toward the advancement of other ideological causes not germane to its duties as collective-bargaining representative * * * be financed from charges, dues, or assessments paid by employees who do not object to advancing those ideas." *Abood*, 431 U.S. at 235-236.

Finally, the *Hanson* line of cases does not solve the "difficult problems in drawing lines between collective-bargaining activities, for which contributions may be compelled, and ideological activities unrelated to collective bargaining, for which such compulsion is prohibited." *Abood*, 431 U.S. at 236.

(b) We pause before turning to the solution to that problem to show that one part of the judgment issued by the district court, affirmed by the court of appeals and not challenged by the Union here incorporates the limitation on the union shop stated in *Street*, affirmed in *Allen* and in *Abood*, and set out directly above.

On the basis of extensive trial testimony and exhibits the district court, in findings and conclusions endorsed by the court of appeals, ruled that petitioners' right to refrain from financial support of Union political activity and ideological activity unrelated to collective bargaining is fully protected:

> 4. On October 6, 1975, BRAC adopted a rebate plan encompassing all political and legislative expenditures of the Grand Lodge and subordinate units, as well as all ideological expenditures and all dues and

contributions to other labor federations, organizations and charities. That plan is a good-faith effort to comply with the requirements imposed by the United States Supreme Court in *International Association of Machinists* v. *Street*, 367 U.S. 740 (1961), and *Brotherhood of Railway and Steamship Clerks* v. *Allen*, 373 U.S. 113 (1963). The Grand Lodge Board of Trustees annually computes political-ideological rebates due to any protesting dues payer for the prior calendar year. These are computed on the basis of forms submitted by subordinate units and upon reports of political time and expenditures by Grand Lodge personnel which are contemporaneously logged on the Grand Lodge computer system throughout the calendar year. Any employee who believes his rebate inadequate may appeal directly to an independent Public Review Board authorized to make final determinations on such appeals. Members of the Board include former Governor Edmund G. Brown, Dean Soia Mentschikoff and Reverend Preston Bradley.

The Board of Trustees' computation for calendar year 1975 disclosed that 4.68% of the Union's total income from dues and fees had been expended for items included in the rebate plan, and each plaintiff in this suit was sent a refund check for that proportion of his 1975 dues payment, as well as for each earlier year back to the date of his initial dues protest. The rebate computation for 1976 was 4.9%, and each plaintiff was then sent that amount for 1976 plus the amount necessary to increase to 4.9% the rebate for each prior year since his protest. Plaintiffs have also been sent their rebates for 1977, amounting to 5.4% of their dues payments in that year. No plaintiff has appealed to the Public Review Board, although each has been advised of his right of appeal. 5. On the basis of the above finding, the Court concludes that plaintiffs' rights in the political-ideological area have been vindicated by the rebates they have received and are protected for the future by the rebate plan. [Pet. App. 30a-31a]

The Union's internal system just described is supplemented by the district court's judgment which "*reduces the dues payment obligation of any plaintiff for each calendar year*" by the "preceding calendar year['s]" ratio of union political and ideological expenditures to total union expenditures (Pet. App. 34a, emphasis added).

Thus, the system approved by the district court, embodied in its judgment, and affirmed in this respect by the court of appeals, does *not*, as the petitioners claim, "allow[] a dissenters' agency fee to be used for impermissible purposes subject to a later union determined rebate." Pet. Br. 31 (Heading). Rather, the district court's judgment tracks this Court's suggestion in *Allen*, 373 U.S. at 122, of a "practical decree," by providing both for a "refund" from dues already paid and for a "reduction of future [dues]." The question whether a straightforward rebate system that requires payment of full dues and a later return of a portion of those dues is, as petitioners contend, legally inadequate is academic in this case. And, petitioners make no showing that the courts below committed any error of law in concluding that the Union's internal system encompasses *all* the Union's expenses "for the expression of political views, on behalf of political candidates or toward the advancement of other ideological causes not germane to its duty as collective-bargaining representative." *Abood*, 431 U.S. at 235.[5]

(c) We now return to the line-drawing problem set out in *Abood*, and contemplated in *Street*, where the Court "embraced an interpretation of the Railway Labor Act not without its difficulties * * * precisely to avoid facing the constitutional issues presented by the use of union shop dues for political and ideological purposes unrelated to collective bargaining." *Abood*, 431 U.S. at 232.

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[5] **Accordingly we believe that Question 3 in the petition discussed at Pet. Br. 31-38 is not justiciable on this record. The writ of certiorari should in this regard be dismissed as improvidently granted. Cf. *Mishkin v. New York*, 383 U.S. 502, 513-514.**

i. While not dispositive, it bears emphasis at the outset, see e.g. *Consumer Product Safety Comm'n v. GTE Sylvania*, 447 U.S. 102, 198, that § 2, Eleventh, *in terms*, permits carriers and labor organizations to enter into agreements providing that all employees covered thereby are "to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership." That section does not provide for deductions from those dues, fees and assessments nor does the section place limits on how those moneys once paid are to be spent.

In *Street*, to be sure, this Court's review of the legislative history led to the conclusion that Congress' intent in enacting § 2, Eleventh was to serve "the limited purpose of eliminating the problems created by the 'free rider.'" 367 U.S. at 767. And the *Street* Court concluded as well that the free rider problem does not include an employee's refusal "to support *political causes he opposes*," because that "is a use [of required dues] which falls clearly outside the reasons advanced by the unions and accepted by Congress why authority to make union-shop agreements was justified * * * [and] is a use to support activities within the area of dissenters' interests which Congress enacted the proviso to protect." *Id.* at 768, emphasis added. Thus, under *Street*, the central inquiry is into the 1951 Congress' understanding of the nature and dimension of the "free rider problem".

According to the petitioners, the free rider problem begins and ends with an objecting employee's refusal to pay a proportionate share of the direct immediate cost to the union of sitting at the bargaining table and negotiating a collective agreement with that employee's employer and of presenting grievances under that agreement to arbitration and judicial tribunals. On this theory, it is said to have been Congress' view that the ordinary operating expenses of a national union to govern itself in a democratic fashion, to seek to organize and to con-

clude collective agreements with as many employers as possible, to communicate with its constituents and to engage in like activities are just as "clearly outside the reasons advanced by the unions and accepted by Congress why authority to make union-shop agreements was justified" (*Street*, 367 U.S. at 767) as union expenditures on "political causes."[6] Congress, however, had a larger

[6] Petitioners' reliance (Pet. Br. 17) on *Retail Clerks v. Schermerhorn*, 373 U.S. 746, 752-754 in support of the "distinction" they would establish between "collective bargaining costs" and "institutional expenses" (all of which, say petitioners, are not chargeable to objecting employees) is wholly unwarranted. The context in which those words were used was entirely different from that of this case and the *Schermerhorn* Court did not, even by way of *dicta*, declare that "collective bargaining" and "institutional" expenses are mutually exclusive categories. The question decided in *Schermerhorn* was whether, pursuant to a collective agreement entered into by parties covered by the *NLRA*, employees who do not become members of the union could lawfully be required to pay "service fees", which were equal to the dues charged to union members, in a state which outlawed such agreements, and notwithstanding § 14(b). See 373 U.S. at 749. Neither *Street* nor *Allen* (which had been decided earlier at the *Schermerhorn* term) were cited.

The *Schermerhorn* Court first set forth a description by the petitioners in that case of a provision of their agreement—"a provision which petitioners say confines the use of nonmember payments to collective bargaining purposes alone and forbids their use by the union for *institutional purposes unrelated to its exclusive agency functions* * * *." 373 U.S. at 752, emphasis added. And it was that provision, so described, that the Court considered and found to be subject to the state's "right to work" law. The phrase "institutional purposes unrelated to [the union's] exclusive agency functions" defeats the present petitioners' attempt to misuse *Schermerhorn* since the very words used allow for the possibility of "institutional expenses *related* to [the union's] exclusive agency functions." Of course, it is our contention here that in § 2, Eleventh Congress considered a national union convention and like activities to be related to the union's exclusive agency functions as, indeed, those activities are.

In this connection it is plain that the *Schermerhorn* opinion's description of expenses that are not for collective bargaining at 373 U.S. 753, n.6 is solely that of the *Schermerhorn* petitioners, whose

view, in accord with the practical realities, of the labor relations system that promotes industrial peace in this society and of the union role in that system.

ii. The record in this case shows that the Union, like all national unions, has substantial operating expenses of the kind at issue in this case. This is not a new reality and the proponents of § 2, Eleventh recognized as much by speaking in general terms of the union costs that would be covered by union security clauses. The statement quoted in *Street* of George Harrison, the primary spokesman for the railroad unions, is typical:

> "Activities of labor organizations resulting in the procurement of employee benefits are costly, and the only source of funds with which to carry on these activities is the dues received from members of the organization. We believe that it is essentially unfair for nonmembers to participate in the benefits

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brief is there quoted. Petitioners here nevertheless rely on that list in asserting that publications and litigation are not chargeable to objecting employees. Pet. Br. 22, 23. Of course, if there were any validity to their position that *Schermerhorn's* discussion of collective bargaining and institutional expenses is precedent for this case, the present controversy concerning the other four categories at issue here (which are, in the aggregate, far more significant) must be decided in BRAC's favor. However, we disavow any reliance on *Schermerhorn*, because the Court said and decided nothing there bearing on the present case.

Petitioners compound their error by claiming significance in *Abood's* quotation of *Schermerhorn*. Pet. Br. 17. Here again, petitioners distort a decision of this Court by wresting language out of context—in this instance the *Abood* Court's discussion of the appropriate remedy. The point, both in *Schermerhorn* and in *Abood*, is that "even if all collections from nonmembers must be directly committed to paying bargaining costs, this fact is of bookkeeping significance only rather than a matter of real substance" where, as in *Schermerhorn*, "the service fee is admittedly the exact equal of membership initiation fees and monthly dues." See 373 U.S. at 753 quoted 431 U.S. at 237, n.35. Here, of course, objecting employees are not required to pay full dues, but only dues *less* the cost of the Union's political activity and ideological activity unrelated to collective bargaining.

> of those activities without contributing anything to the cost. This is especially true *when the collective bargaining representative is one from whose existence and activities he derives most important benefits* and one which is obligated by law to extend these advantages to him." [367 U.S. at 761-762, emphasis supplied]

Thus, the union spokesman in stating the free rider problem made it plain at the outset that the problem did not pertain to the objecting employees' refusal to contribute to the direct cost of collective bargaining narrowly understood, but to the refusal of those employees to bear their proportionate share of the expenses of the "collective bargaining representative * * * from whose existence and activities he derives most important benefits." [7] Only then ("[f]urthermore"), does the statement

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[7] Throughout his testimony Mr. Harrison made the point that the union shop would require that the employee "participate in the collective action through support of the union which represents him." House Hrgs. 9; Senate Hrgs. 15. Indeed, the union witnesses repeatedly described the union shop as requiring covered employees to "support the union," (House Hrgs. 85) and "share the costs of th[e] labor organization" (House Hrgs. 228). See also, House Hrgs. 50, 275; Senate Hrgs. 130, 237. This understanding was shared by the amendment's proponents in Congress. Senator Hill, the bill's floor manager, described the union shop as requiring "a fair contribution to the support of the unions" (96 Cong. Rec. 16279, Leg. Hist. 1166), and Rep. Linehan described § 2 Eleventh as requiring "that those who accept the benefits secured by an organization shall also share equally in the expense of operating such organization." (96 Cong. Rec. 17058, Leg. Hist. 1269).

"House Hrgs." refers to Hearings on H.R. 7789, House Committee on Interstate and Foreign Commerce, 81st Cong., 2d Sess. (1950). "Senate Hrgs." refers to Hearings on S. 3295, Subcommittee of Senate Committee on Labor and Public Welfare, 81st Cong., 2d Sess. (1950).

"Leg. Hist." refers to the Committee Print (Senate Committee on Labor and Public Welfare, 93d Cong., 2d Sess.), Legislative History of the Railway Labor Act, as Amended (1926 through 1966) (G.P.O. January 1974).

go on to specify as a basis for § 2, Eleventh the costs of collective bargaining and to emphasize that under the RLA those costs are particularly heavy. *Id.* at 761-762. Moreover, in describing that collective bargaining, Mr. Harrison referred to the costs of an overall national system of bargaining and grievance adjustment involving national unions. In that regard the 1951 "Congress clearly had [the] consideration[] in mind * * * when it authorized union shop agreements notwithstanding any state law" that "the principal unions in the railroad industry are national in scope and * * * [b]argaining collectively * * * has often taken on a national flavor and agreements are uniformly negotiated for an entire railroad system." [8]

Consistent with the nature and needs of national labor organizations, Mr. Harrison made it plain that the costs of a national convention are included in the kind of costs to which § 2, Eleventh was addressed:

> Mr. HINSHAW. Exactly what do you mean by the term "assessments"?
>
> * * * *
>
> Mr. HARRISON. We have a situation among some of the railroad organizations, Congressman Hinshaw. For instance, let us take my own organization—the clerks. A man pays his dues, and that covers all the activities of the union. We split that up internally between the activities of the union. On the other hand, let us take one of the train-service brotherhoods; for instance, the Brotherhood of Locomotive Firemen and Enginemen. The employee will pay his dues, which will be nominal, and then he will pay an assessment to finance the activities of the general negotiating committee, known as the general grievance committee on the railroad where he is employed, and he will pay that monthly, and it will vary month by month, based on the expenses and work of that

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[8] *California v. Taylor*, 353 U.S. 553, 567 & n.15 citing House Report, No. 2811 on H.R. 7789 p. 5 (August 7, 1950).

committee. It may be that they have an international union convention every 4 years and they have a convention expense assessment to cover the cost of holding those conventions. The fireman would pay that expense as an extra assessment over and above his dues, while in my union the dues would cover all of that, and we would make a distribution internally to the different funds. [House Hrgs. 257-258]

And it was also clearly stated that the dues payment provided for in § 2, Eleventh would cover illness and death benefits.[9] Indeed, the proponents of § 2, Eleventh insisted that union security agreements would cover all the expenses of the union as a union.[10]

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[9] Mr. O'HARA. Now, there is one other question involved in this situation that I would like to get your opinion on. Is it true that certain of the brotherhoods have in addition to the membership certain insurance or other benefits, illness benefits, or death benefits?

Mr. HARRISON. I think all of the unions have benefits of one kind or another. A minority of the unions conduct a life-insurance business and issue individual life-insurance policies.

Mr. O'HARA. As the brotherhoods?

Mr. HARRISON. As the brotherhoods, yes. That is principally true in the so-called operating trades, and I think the Order of Railroad Telegraphers, and one or two of the mechanical trades in the shops.

Otherwise, the balance of the railroad unions have benefit systems. Take my own union, for example: We pay a death benefit of $300, in case of death, to the designated beneficiary, 1 year after becoming a member of the brotherhood, and the member pays nothing directly for that. We pay it out of the grand lodge per capita taxes we get from the local unions. [House Hrgs. 42]

[10] Senator DONNELL. Is there any limit to the amount of the assessment that can be put on by the labor union under this bill?

Mr. HARRISON. There isn't in the bill, Senator, but all the unions have constitutions that have been in existence, some of them, for as long as 100 years, and in my union it is 50 years old.

Senator DONNELL. So if a strike may be in progress there is nothing in this bill and nothing in any law that would

iii. The scope of § 2, Eleventh follows directly from the basic theory of the RLA. The *Street* Court adopted Justice Frankfurter's earlier description of the system of labor relations in the railroad industry—the industry that provided the focus for the 1951 debate:

> "It is fair to say that every stage in the evolution of this railroad labor code was progressively infused with the purpose of securing self-adjustment between the effectively organized railroads and the equally effective railroad unions and, to that end, of establishing facilities for such self-adjustment by the railroad community of its own industrial controversies. . . . The assumption as well as the aim of the Act [ of 1934] is a process of permanent conference and negotiation between the carriers on the one hand and the employees through their unions on the other." *Elgin, J. & E. R. Co.*, v. *Burley*, 325 U.S. 711, 752-753 (dissenting opinion). [367 U.S. at 760]

Two major elements of this system bear emphasis. First, the 1934 RLA amendments were designed "to strengthen the position of the labor organizations vis-a-vis the carriers, to the end of furthering the success of the basic congressional policy of self-adjustment of the industry's labor problems between carrier organizations and *effective labor organizations.*" *Street*, 367 U.S. at 759, emphasis added. Second, "[i]n addition to thus strengthening the unions' status in relation to both the carriers and the employees, the 1934 Act created the National Railroad Adjustment Board and provided that the 18 employee representatives were to be chosen by the labor organizations national in scope." *Id.* at 760, citing to § 3 of the RLA.

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**restrict the assessments which the union could take out of a man's wages, without his consent, for the strike benefit?**

**Mr. HARRISON. Answering your question, Senator Donnell, there is nothing in the bill that in any way restricts what the union might do in the way of assessments, but all the unions have constitutions which control that. [Senate Hrgs. 33]**

**See also House Hrgs. 71 & 262.**

As the *Street* Court recognized, it was this system that Congress sought further to perfect in enacting § 2, Eleventh at the unions' behest. And it is indisputable that in the collective bargaining (including grievance adjustment) Congress sought to promote, the principal responsibility on the union side was exercised by the existing "labor organizations national in scope." Indeed, that "*group* of unions, a group already constituted" received special protection in § 2, Eleventh (c), which provides that for certain of the operating crafts membership in any of those unions would satisfy the membership requirements of subsection (a). *Pennsylvania R. Co. v. Rychlik*, 352 U.S. 480, 494, emphasis in original. Moreover, in fulfilling their statutory responsibilities, these unions were matched against the railway carriers, which included some of the largest corporate enterprises in the country.

Thus, there can be no doubt that reading § 2, Eleventh to exclude the substantial operating expenses of the kind borne by every one of these national labor organizations would cut deeply against Congress' overall purpose in enacting and in amending the RLA—"securing self adjustment of [industrial controversies] between the effectively organized railroads and the equally effective railroad unions."

iv. The legislative history reveals other "problems created by the 'free rider' " very much on Congress' mind.

Perhaps the most important of these "problems" was that the presence of "free riders" and the constant possibility that union members could drop out and become "free riders" created pressure on the unions to act less responsibly in collective bargaining. William Grogan of the Transport Workers Union explained in his testimony before both Houses:

> It is also a fact that under open-shop conditions there is a demand on union leadership forever asking improvements in wages and working conditions without regard to their practicability or even their

> possibility of achievement. The union had to bid for membership and it is forced into a perpetual war with the employer to retain that full membership which a union requires to be effective. [Senate Hrgs. 88; see also House Hrgs. 28] [11]

A related "problem" stressed by § 2, Eleventh's proponents is that the open shop creates a financial incentive for employees not to fully participate in the statutory system of labor relations. For example, during the floor debate, Rep. Linehan, a member of the House Committee that reported out the bill, stated:

> It should be remembered that the Railway Labor Act has, as its foundation stone, the principle that genuine collective bargaining is the way to peaceful relations between labor and management—the way to uninterrupted transportation.
>
> Certainly, collective bargaining can function more effectively if the union voices the sentiments of all the employees and if it is supported by all the employees. [96 Cong. Rec. 17058; Leg. Hist. 1270] [12]

Finally, the general beneficial impact on the morale of the majority should the much-resented "free riders" be required to lend their support to the union was repeatedly emphasized:

> This bill will also enhance peace on the rails. It will remove a major source of irritation and unrest. As I said earlier, railroad workers who regularly and loyally tender their dues to support their unions resent the "free riders" in their midst—the men who take the gains which unions win through long and costly struggles, but refuse to pay one penny toward the expense involved.
>
> Such a situation creates friction. It makes for hard feelings. It lowers morale. It affects output

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[11] See also Senate Hrgs. 16 and House Hrgs. 11, 22-23 (Mr. Harrison); Senate Hrgs. 117-118 and House Hrgs. 226 (Mr. Monahan for URW-CIO); House Hrgs. 131 (Rep. Beckworth).

[12] See also Senate Hrgs. 16, & 130; House Hrgs. 10-11, 49-50.

> and productivity. Without question correction of such situations will raise morale and make for greater productivity. [96 Cong. Rec. 17058; Leg. Hist. 1269-1270 (Rep. Linehan)] [13]

Again, given the substantial operating expenses of national unions, the construction of § 2, Eleventh proposed by petitioners cuts deeply against achievement of each of these purposes.

v. Two further points on the legislative materials are, we believe, particularly pertinent.

First, we have not found, nor have petitioners or the courts below cited, a word in the legislative history to the effect that § 2, Eleventh covers only the direct immediate cost of negotiating and administering a collective agreement with the objecting employee's employer.

Second, the "area of dissenters' interests which Congress enacted the proviso [to § 2, Eleventh] to protect" (*Street*, 367 U.S. at 768) is wholly distinct from the area at issue in this case. As the *Street* Court stated:

> [I]t is abundantly clear that Congress did not completely abandon the policy of full freedom of choice embodied in the 1934 Act, but rather made inroads on it for the limited purpose of eliminating the problems created by the "free rider." That policy survives in § 2, Eleventh in the safeguards intended to protect freedom of dissent. [*Street*, 367 U.S. at 767]

Section 2, Eleventh, then, makes "inroads" into the previously unlimited domain of "the policy of full freedom of choice" to make room for the policy "of eliminating the problems created by the 'free rider.'" And, as we have just shown, the failure of objecting employees to pay their proportionate share of national union operating expenses, such as those at issue here, was recognized by Congress to be a critical component of the "free rider problem."

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[13] See also Senate Hrgs. 16, 130 & 236-237; House Hrgs. 11, 50 & 275.

vi. The showing to this point demonstrates that this case is governed by *Hanson's* holding and is not affected by the constitutional question that the Court reserved in *Hanson* and that in *Street* counseled the Court to "embrace[] an interpretation of the Railway Labor Act not without its difficulties" (*Abood*, 431 U.S. at 232).

It is conceivable that Congress could have limited the scope of the union shop so as to benefit only inherently unstable atomistic entities each with a half-life limited to that necessary to negotiate a collective bargaining agreement with a particular employer or to settle a grievance. But given the history of labor relations in this country—particularly the high degree of organization on the employer side and the propensity of those effectively organized employers to oppose employee organization and collective bargaining—it is extraordinarily unlikely that such a system would have succeeded in advancing Congress' purposes in enacting and amending the RLA. Congress therefore did not proceed in that direction; rather Congress' scheme for furthering industrial peace through the "self-adjustment * * * of industrial disputes" has been based on enhancing the opportunity of employees to meet the "effectively organized railroads" through larger, more complex and potentially more stable entities—"equally effective railroad unions." *Street*, 367 U.S. at 760. The proponents of § 2 Eleventh—the existing "labor organizations national in scope" (*id.*) who initiated the union shop proposal and the Senators and Congressmen who found merit in the proposal—were well aware that effective ongoing enterprises do not continue on momentum alone but must spend time, effort and money on such matters essential to maintaining their internal coherence as governing themselves, communicating with their constituents on the organization's activities, bringing and defending lawsuits concerning all facets of those activities and adapting to the changing circumstances generated by a dynamic economy. And the legislative materials show that § 2, Eleventh was intended to cover such operating

expenditures and that a failure to do so would thwart Congress' plan for industrial peace.

Thus, what this Court said in *Hanson* is dispositive here:

> Congress has authority to adopt all appropriate measures to "facilitate the amicable settlement of disputes which threaten the service of the necessary agencies of interstate transportation." *Texas & N.O.R. Co. v. Railway Clerks*, 281 U.S. 548, 570. * * * Industrial peace along the arteries of commerce is a legitimate objective; and Congress has great latitude in choosing the methods by which it is to be obtained. * * * The ingredients of industrial peace and stabilized labor-management relations are numerous and complex. They may well vary from age to age from industry to industry. What would be needful one decade might be anathema the next. The decision rests with the policy makers, not with the judiciary.
>
> * * * The only conditions to union membership authorized by § 2 Eleventh of the Railway Labor Act are the payment of "periodic dues, initiation fees, and assessments." The assessments that may be lawfully imposed do not include "fines and penalties." *The financial support required relates, therefore, to the work of the union in the realm of collective bargaining. No more precise allocation of union overhead to individual members seems to us to be necessary.*
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> * * * *
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> * * * If other conditions are in fact imposed, or if the exaction of dues, initiation fees, or assessments is used as a cover for forcing ideological conformity or other action in contravention of the First Amendment, this judgment will not prejudice the decision in that case. For we pass narrowly on § 2, Eleventh of the Railway Labor Act. We only hold that *the requirement for financial support of the collective-bargaining agency by all who receive the benefits of its work is within the power of Congress under the Commerce Clause and does not violate either the*

*First or the Fifth Amendment.* [351 U.S. at 233-235, 238, emphasis added.]

Thus, *Hanson* establishes that required "financial support [that] relates * * * to the work of the union in the realm of collective bargaining" is *not* "the exaction of dues * * * as a cover for forcing ideological conformity or other actions in contravention of the First Amendment." Nothing in *Street*, *Allen* or in *Abood* or in any other of this Court's subsequent First Amendment decisions qualifies in any way *Hanson's* holding. Indeed, *Street* answers petitioners' "strict scrutiny" theory, which is the sole support for their contention that § 2, Eleventh is unconstitutional if the section covers the union operating expenditures at issue here. Pet. Br. 7-10. That thesis proceeds from the assumption that only the objecting employees' First Amendment rights are at stake, whereas *Street* holds that the *majority* also has First Amendment rights entitled to equal protection:

> [T]he majority also has an interest in stating its views without being silenced by the dissenters. To attain the appropriate reconciliation between majority and dissenting interests in the area of political expression, we think the courts in administering the Act should select remedies which protect both interests to the maximum extent possible without undue impingement of one on the other. [367 U.S. at 773]

The Court reaffirmed that holding in *Allen*:

> [N]o decree would be proper which appeared likely to infringe the unions' right to expend uniform exactions under the union-shop agreement in support of activities *germane to collective bargaining* and, as well, to expend nondissenters' such exactions in support of political activities. [373 U.S. at 122, emphasis added]

The foregoing was then quoted with approval in *Abood*, 431 U.S. at 239-240, n.40.

If the objectors were permitted to pay *less than* their pro rata share of all expenses germane to the work of the

unions in the realm of collective bargaining—the *nonobjectors* would have to pay a *greater* share of those expenses and *their* First Amendment rights would be infringed.

## II. The Court of Appeals Correctly Concluded that the National Union Operating Expenditures at Issue Here Are Chargeable to Objecting Employees Covered by an RLA Union Security Agreement

The court of appeals concluded that each of the six classes of national union operating expenditures challenged here is chargeable to objecting employees. Following the sequence of that court's discussion we now show that its conclusion in each instance is correct. We then turn to and answer separately petitioners' contention that § 2, Eleventh covers only expenditures for collective bargaining and grievance handling with the objecting employee's employer.

### (a) Grand Lodge Conventions

Congress clearly understood that dues collected under § 2, Eleventh would be used to finance national union conventions. See pp. 16-17 *supra*. The district court nevertheless held that *none* of BRAC's convention costs are chargeable to objecting employees. In reversing that ruling the court of appeals stated:

> BRAC represents 200,000 employees throughout the country. The Grand Lodge is either in charge of or directly involved in negotiating the collective bargaining agreements pertaining to most of those employees. The quadrennial convention is an important forum for rank and file participation in determining the Grand Lodge's collective bargaining policies. [Pet. App. 11a]

The foregoing is amply documented in the record.

The basic function of the Grand Lodge is to carry out and support collective bargaining. As BRAC President Kroll put it, "really the main function is collective bargaining, obtaining agreements for the people [that] pay

fair wages and decent benefits, and to police those contracts, to constantly administrate them and help the people out" (RT 25). In the case of most of the 200,000 employees represented by BRAC the Grand Lodge is either directly in charge of the negotiation of their collective bargaining agreements or closely involved therein (RT 45).[14]

BRAC's quadrennial convention is the "absolute authority of the union," the means through which authority, "at the top and the bottom, lies with the rank and file" (RT 16-18). Among the duties imposed by the BRAC Constitution upon the convention and its official committees are setting basic policy, acting on resolutions and petitions of the membership, resolving appeals from decisions of the international president and executive council, electing international officers, inquiring into the Union's management and financial standing, and acting on recommendations regarding retirement and unemployment insurance (CR 291 Ex. A, Art. 8). The ultimate significance of the convention in collective bargaining is summarized in the affidavit of Professor Lloyd Ulman, an eminent labor economist who is Director of the Institute of Industrial Relations at the University of California at Berkeley (A. 201-202):

> National unions tend to be large, pluralistic organizations in which substantive differences in economic priorities have to be hammered out among the mem-

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[14] In describing this role, President Kroll gave examples which included his personal involvement in negotiation of the most recent Western Airlines contract (RT 21-25). He also enumerated the activities of International Vice Presidents in contract negotiation and in representation at arbitration and before Public Law Boards (e.g., RT 35, 36), and in supporting subordinate unit activities—for example, assistance on health and welfare questions and pension improvements (RT 36, 37-38). Grand Lodge staff members engage in similar collective bargaining support (RT 40-47). In one instance the Grand Lodge saved the jobs of many Western Airline employees by successfully representing their interests through grievance arbitration (RT 41).

> bers * * *. [U]nion elections and conventions provide a means for arriving at a consensus on all of the myriad issues which affect local and national bargaining strategies. [A. 207]

The 1975 BRAC Convention Proceedings, covering a week of activity, illustrate Professor Ulman's point about consensus and "the myriad issues which affect local and national bargaining."

A major item of business at the Convention was the election of national officers.[15] Petitioners denigrate this activity as "intra-union politics" which they contrast "with collective bargaining with Western Airlines" (Pet. Br. 21). But the intimate relationship between the democratic election of union officers and collective bargaining by the union with each of the employers whose employees the union represents should be self-evident. Congress has not only acknowledged, but has acted upon, that truth by enacting Title IV of the Labor Management Reporting and Disclosure Act of 1959 ("LMRDA") whose "special function * * * is to insure 'free and democratic' elections". *Wirtz v. Bottle Blowers Assn.*, 389 U.S. 463, 470. See especially *id.* at n.9 quoting identical Senate and House Reports declaring the Government's obligation to provide for such elections because unions have been vested with power as exclusive bargaining representatives by the NLRA and the RLA. Indeed, it is by virtue of its status as a bargaining representative (and that of its subsidiary bodies) that BRAC is considered a "labor organization" for purposes of the LRMDA (see §§ 3(i)

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[15] Arguments and speeches relating to various candidates emphasized accomplishments and qualities such as economic gains for represented members (e.g., CR Ex. S, pp. 72-73), leadership in negotiations (e.g., *id.*, p. 68), experience in handling union problems (179), negotiating ability and experience (180), belief in fiscal responsibility (1981), tenacity in dealing with management (184), numbers of cases processed and claims paid to employees represented (189), the number of bargaining agreements handled (190), and won-lost records before Public Law Boards and Special Boards of Adjustment (193).

and (j), 29 U.S.C. § 401(i) and (j)), and as such is required to elect national officers not less often than once every five years by referendum or convention (see § 401(a), 29 U.S.C. § 481(a)). The fact, seized on at Pet. Br. 21-22, n.16, that Congress permitted the alternative of a referendum does not affect, let alone sever, the relationship between conventions and collective bargaining. BRAC elects at conventions, as do most national unions; the referendum option has been considered but rejected on the basis of the delegates' greater knowledge of the candidates' abilities, the time that would be taken from union business by campaigning, and the cost (CR 155 Ex. S, pp. 143-44). To enable objecting employees to escape paying their proportionate share of convention costs because the majority has chosen the convention method of election which Congress authorized would be wholly inconsistent with the majority's rights as recognized in *Street* and *Allen*.

A second major area of convention concern involved the Union's internal structure and fiscal management. The delegates considered and approved a dues increase and considered revisions in the dues structure and distribution (e.g., CR 155 Ex. S, pp. at 20-21, 46-59, 433-44, 457-62); reviewed the finances of the Union (e.g., 145-48, 405-13); created an Air Transport Division (351-52); resolved appeals and proposals for the restructuring of subordinate units, debating whether employee representation was more effective under the old or new arrangements and whether the procedures followed were sufficiently democratic (e.g., 132-43, 328-43).

And the largest part of the 1975 convention was devoted to reports, debates and voting on contract bargaining, grievance handling, and employee wage and benefit issues. One of the first events of the convention was a report on national negotiations, including progress on wages, retirement benefits, the health and welfare plan, cost of living increases, job stabilization, and grievance handling (CR 155 Ex. S, pp. 14-19). The convention

spent hours on: employee retirement problems (e.g., 149-58); interest on back pay due as a result of national wage contracts or agreement violations (160-61); stabilization of employment, longevity pay, shift differentials, holiday pay, sick leave, bereavement pay, retention of seniority, strike ballots (161-69, 246-58); employee passes on buses, railroads and airlines, as well as birthday-holidays and flexitime arrangements (350-76); employer mutual aid pacts, protection for employees in airline mergers, cost of living increases in retirement benefits (321-25); strikes (319-21); and ratification of nationally negotiated collective agreements (399-405). Such deliberations over working conditions and contract provisions are at the core of the collective bargaining process, and are the central reason why local unions affiliate with national bodies to promote the common interest in improved wages and working conditions.

In sum, the Union's convention considers direct collective bargaining matters and the governance and maintenance of the bargaining entity itself. Petitioners' sole dispute with that description of the convention activity is that the "convention minutes reveal heavy emphasis upon political, ideological, and social activities and programs" (Pet. Br. 21). That "heavy emphasis" consists of: a total of ten speeches by public officials of both parties, the Mayor of Washington, D.C. (the host city), the President of the AFL-CIO (with which BRAC was and is affiliated) and the director of the AFL-CIO Committee on Political Education; and, since the Union is engaged in "lobbying activities", the few reports and resolutions adopted so that future legislative activities would represent the democratic will of the membership.[16]

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[16] While the apperances of the Mayor of Washington and the other public officials created no additional costs to BRAC, if there had been such costs, for example if any of these speakers had received an honorarium, those costs would have been deducted from objecting employees' dues under the Union's internal system.

Petitioners nonetheless assert that the "convention had little or nothing to do with collective bargaining with Western Airlines. Substantial convention activity was devoted to intra-union politics, disputes and fiscal management" (Pet. Br. 21). The second sentence of the foregoing does not support the assertion in the first sentence; rather, the second refutes the first. These activities are indispensable to the ability of this and any other union to carry on collective bargaining activities. Here, as elsewhere, petitioners simply fail to acknowledge that a union's "existence and activities" are inextricably interwoven.[17] The union negotiates and administers agreements through individuals who are its officers or employees and who are effectuating its democratically established policies. The expenditures attendant on the choosing of the union's officers and the formulation of these policies are an indispensable precondition of the entire process.

**(b) Grand Lodge Litigation**

In concluding that all the Grand Lodge litigation expenses are chargeable to the objectors, the court of appeals found:

> Paragraph 22 exempts the vast majority of the union's litigation expenditures from protesting employees' dues obligations. While the exempted cases did not pertain to any specific collective bargaining agreement or grievance, they did involve such things as: the union's challenge to the legality of the airline industry's Mutual Aid Pact, under which a struck carrier receives substantial financial assistance from non-struck carriers; the protection of employees' rights during bankruptcy proceedings involving an employer; the doctrine of fair representation; and the defense of suits alleging violation of the non-discrimination requirements of Title VII. [Pet. App. 12a]

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[17] The phrase is that of George Harrison quoted in *Street*, 367 U.S. at 761 and set forth at pp. 14-15 *supra*.

Petitioners object that this litigation did not involve Western Airlines (Pet. Br. 23), but, contrary to their contention, there is nothing in *Street*, *Allen* or *Abood* limiting chargeable expenditures to a particular employer-employee relationship. Indeed, the litigation expense category illustrates the irrationality and unworkability of that portion of petitioners' theory. Litigation concerning the legality of the Airlines Mutual Air Pact, which affected the Union's bargaining strength vis-a-vis *all* air carriers potentially benefitted Western Airlines employees to the same extent whether BRAC represented the employees of no other airline or of dozens. Thus, on any sensible approach, the full cost of that litigation would properly have been attributed to Western Airlines employees. However, due to BRAC's size, the cost of the litigation was a considerably smaller percentage of those employees' dues than if BRAC represented only the employees of Western, and a yet smaller proportion because of the dues paid by *railroad* employees. The latter potentially benefitted because of the impact on BRAC's bargaining strength as an organization, but they would not have been chargeable therefor under petitioners' proposed legal standard.[18]

It is relatively rare that labor litigation has consequences for this train or this air line only. More fundamentally, petitioners' argument is inconsistent with the nature of collective bargaining by national unions in which the combined strength of the group increases the bargaining power of all. Petitioners' effort to carve out Western Airlines as a separate island for financial purposes is wholly inconsistent with this philosophy—which as we have shown was Congress' philosophy embodied in

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[18] To cite another example the bankruptcy proceedings in which BRAC participated—though fortunately for Western Airlines employees not involving that carrier—could have established legal rules ultimately affecting Western Airlines employees. Compare *National Labor Relations Board v. Bildisco & Bildisco, etc.*, Nos. 82-818 and 82-852, argued October 11, 1983.

the RLA—and gives no weight to the benefit the petitioners derive from membership in a national union.

**(c) Grand Lodge Publications**

In concluding that the cost of Grand Lodge publications is an expense chargeable to objecting employees the court of appeals said:

> The monthly magazine of the Grand Lodge is the union's primary means of communicating information concerning collective bargaining, contract administration, and employees' rights to employees represented by BRAC. * * * While the magazine also includes general and recreational materials to make it more readable, that fact does not detract from the publication's value in the collective bargaining process. It would be extremely difficult for a union to represent employees without an effective means of communication. [Pet. App. 12a]

According to petitioners: "A cursory review of the *Railway Clerk/interchange* magazine reveals that the predominant purpose of this publication is not to convey collective bargaining information, but to promulgate BRAC's political, ideological, and fraternal cause." (Pet. Br. 22). Petitioners' review is indeed "cursory" because as the court of appeals concluded, and as we document in a footnote, the principal focus of the magazine is unquestionably on straight collective bargaining activities; it is the place for reporting such significant events as the initiation and outcome of negotiations and for educating employees on collective bargaining.[19]

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[19] Thus, issues of the *Railway Clerk/interchange* in the record include explanations of specific contract demands in national negotiations (e.g., CR 155 Ex. K, p. 4; Ex. N, p. 2); announcement of deadlock in negotiations and appointment of a federal mediator (CR 155 Ex. M, pp. 2, 6); news of a strike ballot and an explanation of issues involved in the potential strike (CR 155 Ex. N, pp. 2, 4); announcement of the outcome of a strike vote and appointment of a Presidential fact-finding board (CR 155 Ex. O, pp. 2, 4); and successful conclusion of negotiations (CR 155 Ex. Q, pp. 4-5). Significant events for individual system boards and locals are also

The district court did not find to the contrary, but instead excluded the cost of the publication *in toto* on the belief that no dues money of an objecting employee may be expended for "Publications in which substantial coverage is devoted to general news, recreational and social activities, political and legislative matters, and cartoons" (Pet. App. 22a). That court did not explain why objectors should not be required to pay for the costs of publishing materials concerning collective bargaining, even if coverage of other subjects is "substantial"—a critical term that the district court neither defined, nor explicated in terms of this record. In any event, it is too simplistic to regard these other materials as unrelated to the basic function of the publication; for as the court of appeals recognized, these materials make the magazine more readable. The publication's educational value would likely be wasted if the magazine were as forbiddingly dry as the district court would make it. And no explanation has been provided as to why a court should, under the RLA or the First Amendment, substitute the court's own editorial judgment of what a union publication should contain in order to fulfill its function of communicating with its readers concerning that union's collective bargaining, for the union's judgment. Finally it is left equally obscure why it is not sufficient that insofar as the publication contains political and legislative material, under the Union's internal system, the cost of that material is *not* chargeable to objecting employees (A. 436, ¶¶ f, i). Petitioners rely on the existence of such material, but fail to acknowledge that they are not charged therefor.

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reported, particularly newly negotiated contracts and their major terms; for example, pacts with Western Airlines (CR 155 Ex. Q, pp. 8-9) and other employers (CR 155, Ex. L., p. 11, Ex. O, pp. 10-11, Ex. P., p. 7). Another area occupying considerable space is information related to contract administration; readers are advised in every issue on common questions about subjects such as unemployment benefits, sick benefits, annuity rights, and health insurance (e.g., CR 155 Ex. H, pp. 26-27; Ex. I, p. 26; Ex. Q, P. 4).

Petitioners also object to the magazine's references to BRAC endorsed boycotts, describing those references as "an ideological commitment" (Pet. Br. 22). While the cost of this portion of any issue of the magazine is undoubtedly *de minimis*, the point of principle is not insignificant. In supporting such a boycott BRAC either is furthering its own collective bargaining dispute with an employer, or is making common cause with other labor organizations. In the latter situation the Union fosters alliances with the labor movement generally: Even on petitioners' own narrow terms, BRAC thereby achieves a stronger position to call for a boycott by union members and sympathizers generally in the event of a strike against Western Airlines. In Judge Learned Hand's words:

> When all the other workmen in a shop make common cause with a fellow workman over his separate grievance, and go out on strike in his support, they engage in a "concerted activity" for "mutual aid or protection," although the aggrieved workman is the only one of them who has any immediate stake in the outcome. The rest know that by their action each one of them assures himself, in case his turn ever comes, of the support of the one whom they are all then helping; and the solidarity so established is "mutual aid" in the most literal sense, as nobody doubts. So too of those engaging in a "sympathetic strike," or secondary boycott; the immediate quarrel does not itself concern them, but by extending the number of those who will make the enemy of one the enemy of all, the power of each is vastly increased.[20]

**(d) Grand Lodge Social Activities**

The district court ruled that all "recreational, social and entertainment expenses" other than those for activi-

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[20] *National Labor Rel. Bd.* v. *Peter C.K. Swiss Chocolate Co.*, 140 F.2d 503, 505-506 (C.A. 2). See also *General Electric Company*, 169 NLRB 1101, 1103-1104, enforced 411 F.2d 750 (C.A. 9), *cert. den.*, 396 U.S. 856.

ties attended by management personnel are not chargeable to objecting employees.[21] In rejecting that view the court of appeals said:

> The union purchases refreshments for business meetings and occasional social activities, which are open to non-member agency fee payers as well as union members. *Only minuscule amounts of money*—approximately .70 of one percent of Grand Lodge expenditures—*are involved.* These small expenditures are important to the union's members because they bring about harmonious working relationships, promote closer ties among employees, and create a more pleasant environment for union meetings. [Pet. App. 13a; emphasis added]

That petitioners pursue to this Court their resistance to paying a proportionate share of these minimal expenses (Pet. Br. 24-25) trivializes the First Amendment underpinnings of the *Street* doctrine. And their flat assertion that "labor organizations are fraternal associations; their secondary role is that of a bargaining representative" (Pet. Br. 24), is not only factually inaccurate but legally irrelevant. Of course labor organizations have historically been fraternal associations, but are such for a particular purpose: To represent workers in order to promote those workers' economic welfare. It is precisely because Congress is convinced that the economic importance of labor unions outweighs their fraternal aspects, that the internal affairs of unions have been subject to considerably more rigorous regulation than those of other fraternal associations. See, e.g., pp. 27-28, *supra.*

**(e) Grand Lodge Death Benefits**

Petitioners assert that "The non-chargeability of such fraternal benefit programs [as death benefits] has been clear since this Court's decisions in *Street* and *Allen.*" (Pet. Br. 19). This exemplifies their irresponsible use of

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[21] The question whether the cost for such activities may constitutionally be charged to objecting public employees was reserved in *Abood*, 431 U.S. at 236, n.33.

those precedents. *Street* did not reach the question of whether expenditures for death benefits financed by union dues are chargeable to objectors (367 U.S. at 769-770 & n.18), and *Allen* did not go beyond *Street* in defining the category of expenditures not chargeable to objecting employees.

Addressing the issue as an original proposition, which it is, there are three reasons why petitioners' claim that they may not be charged for death benefits must fail. First, Congress plainly understood that dues paid under union security agreements would be used to finance union death benefit plans. See p. 17 *supra*. Second, not even petitioners contend that the First Amendment provides the basis for invalidating this use of union dues to provide all employees represented by the union a form of insurance benefit. Third, the court of appeals was correct in stating "insurance benefits are a mandatory subject of collective bargaining. If BRAC chooses to provide death benefits itself for all employees, rather than to seek such benefits from the employer, it is then in a better position to negotiate for additional benefits or higher wages." Pet. App. 13a; citation omitted. Although petitioners charge that this point is "absurd" (Pet. Br. 29), the court of appeals merely recognized the realities of collective bargaining as stated by this Court:

> Funding a pension program is a current cost of employing potential pension recipients, as are wages. The size of pension benefits is a subject of collective bargaining, and future benefits may be traded off against current compensation.[22]

**(f) Grand Lodge Organizing**

In deciding that organizing expenses are chargeable to objecting employees, the court of appeals recognized "Maxi-

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[22] *Alabama Power Company* v. *Davis*, 431 U.S. 581, 592-593, footnotes omitted. While the cost of pension programs is considerably greater than that of death benefits that difference is immaterial here.

mum organization of an industry benefits employees and units already organized" (Pet. App. 13). We elaborate on this proposition because it is on principle the most important of all the categories at issue in this case and because petitioners' position that they need not pay their share of organizing expenses betrays their misunderstanding of the nature of collective bargaining and their obstinate nonacceptance of *Hanson's* holding that § 2, Eleventh is constitutional.

This Court set forth the basic theory of collective bargaining, and emphasized that organizing is indispensable to make it effective. In *American Steel Foundries v. Tri-City Central Trades Council*, 257 U.S. 184, 209, Chief Justice Taft wrote:

> [Labor unions] were organized out of the necessities of the situation. A single employee was helpless in dealing with an employer. He was dependent ordinarily on his daily wage for the maintenance of himself and family. If the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employ and to resist arbitrary and unfair treatment. Union was essential to give laborers opportunity to deal on equality with their employer. * * * The right to combine for such a lawful purpose has in many years not been denied by any court. The strike became a lawful instrument in a lawful economic struggle of labor between employer and employees as to the share or division between them of the joint product of labor and capital. *To render this combination at all effective, employees must make their combination extend beyond one shop. It is helpful to have as many as may be in the same trade in the same community united, because in the competition between employers they are bound to be affected by the standard of wages of their trade in the neighborhood.* Therefore they may use all lawful propaganda to enlarge their membership and especially among those whose labor at lower wages will injure their whole guild. [emphasis added]

This analysis was reaffirmed when the Court sustained the constitutionality of the original Railway Labor Act in *Texas & N.O.R. Co. v. Ry. Clerks*, 281 U.S. 548, 570:

> The legality of collective action on the part of employees in order to safeguard their proper interests is not to be disputed. It has long been recognized that employees are entitled to organize for the purpose of securing the redress of grievances and to promote agreements with employers relating to rates of pay and conditions of work. *American Steel Foundries v. Tri-City Central Trades Council*, 257 U.S. 184, 209. Congress was not required to ignore this right of the employees but could safeguard it and seek to make their appropriate collective action an instrument of peace rather than of strife.[23]

The Court again recognized this economic imperative in *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 503:

> Since, in order to render a labor combination effective it must eliminate the competition from non-union made goods, see *American Steel Foundries* v. *Tri-City Central Trades Council*, 257 U.S. 184, 209, an elimination of price competition based on differences in labor standards is the objective of any national labor organization.

See also *Mine Workers v. Pennington*, 381 U.S. 657, 666 and *Musicians Federation v. Carroll*, 391 U.S. 99, 106.

In sum, when petitioners seek to divorce collective bargaining from organizing they cavalierly disregard the accepted wisdom of more than sixty years of judicial decisions as well as the fact that they are the beneficiaries of the Union's past organizing efforts, without which the Union would not have come into being, and would not have become the representative empowered to negotiate and enforce the collective agreements covering the objecting employees. No such ignorance may be attributed to Congress.

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[23] See also *Labor Board v. Jones & Laughlin*, 301 U.S. 1, 33 (sustaining the NLRA's constitutionality) and *Labor Board v. Drivers Local Union*, 362 U.S. 274, 279.

*American Steel Foundries* and *Texas & N.O.R. Co.* had already been decided when Congress in 1934 amended the RLA to strengthen the position of the national railroad unions and when in 1951 that purpose was taken a step further through § 2, Eleventh. See pp. 18-19, *supra*. There is, of course, nothing in the legislative history of the 1951 amendments to the RLA supporting the contention that Congress intended to foreclose the use of union shop dues in organizing. And while the First Amendment, like the Fourteenth, enacts no particular economic theory, neither requires that Congress or this Court not see what "[a]ll others can see and understand." Cf. *Child Labor Tax Case*, 259 U.S. 20, 37.[24]

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[24] Petitioners' position that organizing expenses are not chargeable to them as a cost of collective bargaining is, as we have just shown, wholly inconsistent with the prevailing understanding when Congress enacted § 2, Eleventh. No more is necessary to refute petitioners' claim. But if the unity of collective bargaining and organization is one requiring evidentiary proof, it is abundantly present on this record.

Former Secretary of Labor Willard Wirtz emphasized in an affidavit in this case:

> One of the strongest impulses to national union organizations stems from the situation of the unionized employers who compete with the unorganized employers. No meaningful economic improvement is possible, and union representation itself is jeopardized, if substantial numbers of lower-paid workers remain employed in the industry. Indeed, the original impulse to organize national unions arose from the widening of product markets. A classic description of this process was given in 1909 by John R. Commons in "American Shoemakers, 1648-1895: A Sketch of Industrial Evolution" (Quarterly Journal of Economics, November, 1909, pp. 39-84) . . . [A. 227-228; see also A. 203-209 (Prof. Lloyd Ulman)]

In addition to reducing or eliminating the effects of job competition from successful unorganized employers, organizing clearly enhances a union's ability to conduct negotiations and administer grievances. The negotiation of collective bargaining agreements is cyclical. Some staff—for example, economists, actuaries, and lawyers specializing in negotiations—may not be required at all except during peaks in the bargaining cycle. However, hiring and retraining costs may make it impossible to adjust the size of the

**(g) The "Western Airlines" Limitation**

A running theme of petitioners' brief is that they may be required to support only "the statutorily required collective bargaining activities *with Western Airlines.*" Pet. Br. 15. We have already demonstrated some of the incongruities of this restriction and now show briefly that petitioners' theory is wholly without statutory or constitutional foundation.

As to the latter, it should suffice to reiterate that *Hanson* sustained the constitutionality of a statute that requires employees to pay dues to *national* unions. And, it is readily shown that petitioners' statutory argument cannot be reconciled with Congress' special concern for the financial needs of such national unions.

These complex institutions' costs must be met yearly whether or not in that year negotiations of a new contract are conducted with any given employer, yet all represented employees benefit by having that institutional structure in place when negotiations with *their* employer do occur. So too, one of the major purposes of workers joining in national unions is to pool the collective strength of as

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staff in response to cyclical variations. Consequently, a union which cannot shift such specialized resources from one collective bargaining crisis to another may be forced to choose between limiting these services and maintaining what economists call "excess" capacity. Thus, organizing also permits a union to spread both fixed costs and excess capacity over more members, *decreasing* the average cost per member in the original unit and/or *increasing* the support services available to benefit each member in the bargaining process.

Organization is necessary also to protect the organized workers against the loss of work by subcontracting to unorganized employers (see A. 247-51) and against the loss of representation rights if their employer is taken over by a larger unorganized employer, as occurred with devastating consequences to BRAC members when the organized Capitol Airlines was merged into United Airlines (CR 155 at 55 n.30). See *Brotherhood of Railway S.S. Clerks v. United Airlines*, 325 F.2d 576 (C.A. 6), cert. dismissed, 379 U.S. 26.)

many as possible to achieve their bargaining goals. See pp. 36 to 39, *supra*. The employees of Western Airlines (for example) are strengthened in their negotiations with that employer by the availability of strike support funds collected from *all* the members of the union, not just those employed by Western. Furthermore, as we have seen, the 1951 Congress' model of collective bargaining was industrywide bargaining in the railroad industry. It would be wholly artificial, if not impossible, to carve out from the cost of bargaining with all the railroads the costs of bargaining with any individual railroad involved in those negotiations.[25]

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[25] It is irrelevant in this connection that the statutory bargaining duty involves a "particular employer-union relationship" (Pet. Br. 15)—which, however, may involve several or many employers in joint negotiations. For, as we have shown at length, a union's *costs* of bargaining are not so confined, and under § 2, Eleventh a union is entitled at the least to receive from objecting employees their share of the costs of bargaining. And while the duty of fair representation and § 2, Eleventh have a common source in the union's status as exclusive bargaining representative, and the legislative history shows that the union's duty to serve all employees in the craft or class was one of the considerations underlying § 2, Eleventh, there is no merit to the suggestion (Pet. Br. 15) that chargeable expenses and the duty are congruent in scope. The duty of fair representation was fashioned by this Court to protect individual employees whom federal law has deprived of the "power to order his own relations with his employer" (*NLRB v. Allis-Chalmers*, 388 U.S. 175, 180); the cases at Pet. Br. 15 therefore correctly decided that the duty extends only to unfair conduct by a union in negotiating or administering agreements. The purposes of § 2, Eleventh need not be reiterated (see Part I of the Argument, *supra*); these purposes would be frustrated, as *Street* and *Allen* hold, if the dissenters were to pay less than their proportionate share of the costs incurred in fulfilling the union's statutory role. Thus, for example, while the costs of electing a national union official are a cost of collective bargaining (see pp. 27-28, & 30, *supra*), the conduct of such elections is obviously not subject to the duty of fair representation. Indeed, the entirely different statutory protection which Congress has provided in Title IV of the LMRDA (though also having its source in the union's power as bargaining representative) runs in favor of members only, in sharp contrast to the duty of fair representation.

## III. PETITIONERS' CONTENTION THAT THE COURTS BELOW APPLIED AN INCORRECT STANDARD OF PROOF IS WITHOUT MERIT

As the Court recently observed: "In a typical civil suit for money damages, plaintiffs must prove their case by a preponderance of the evidence." *Herman & MacLean v. Huddleston*, —— U.S. ——, 51 L.W. 4099, 4103 (January 24, 1983), hereafter "*Huddleston*".[26] In this case, however, defendants accepted the burden of proving by a preponderance of the evidence the proportion of the union budget expended on ¶ 22 items—that is, those which the district court had previously ruled were not chargeable to petitioners, and which were not subject to BRAC's internal system. See pp. 3-4, *supra*. It was on this basis that the district court made findings which resulted in its determination of the proportion of dues payable to petitioners under ¶ 22. While the placing of the burden of persuasion on defendants rather than on plaintiffs is, we believe, unnecessarily generous to the latter, that issue, though important for future cases is not present here.[27] Rather petitioners contend that defend-

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[26] See also, *e.g.*, *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 252-253, 256 ("*Burdine*"); *U.S. Postal Service v. Aikens*, —— U.S. ——, 51 L.W. 4354, 4356 (Apr. 4, 1983).

[27] The question turns on the meaning of the following sentence in *Allen*:

> Since the unions possess the facts and records from which the proportion of political to total union expenditures can reasonably be calculated, basic considerations of fairness compel that they, not the individual employees, *bear the burden* of proving such proportion. [373 U.S. at 122, emphasis added]

The issue is whether the "burden of proof" refers to the burden of coming forward with evidence or encompasses also the burden of persuasion. Since the rationale of *Allen* was the union's superior access to evidence, the interpretation more consistent with accepted legal principles is that the union bears only the burden of coming forward. The analysis is most fully developed in *Burdine*, 450 U.S. at 252-256.

ants should be required to prove chargeable costs by "clear and convincing evidence", a contention they join with the assertion—wholly unsupported by any findings in the lower courts—that BRAC's accounting records do not provide such evidence. We shall first address the standard of proof issue and then the accounting issue.

(a) A "standard of proof 'serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision.' [The Court has] required proof by clear and convincing evidence where particularly important individual interests or rights are at stake." *Huddleston*, 51 L.W. at 4103, citations omitted. But that principle is inapplicable here, because as the Court determined in *Street*, *Allen* and *Abood* the First Amendment rights of the nonobjectors as well as those of the objectors must be considered in determining the dues obligations of each. See pp. 24-25, *supra*.[28] Accordingly, the relevant principle, also stated in *Huddleston*, is:

> A preponderance-of-the-evidence standard allows both parties to "share the risk of error in roughly equal fashion." *Addington* v. *Texas*, 441 U.S. 418 at 423. Any other standard expresses a preference for one side's interests. [51 L.W. at 4103]

Since the First Amendment interests of the majority and the dissenters are of equal importance no preference for

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[28] This analysis parallels the remedial analysis of *Street* and its progeny. The remedies in those cases were designed to effectuate a "reconciliation between the majority and dissenting interests" (*Street*, 367 U.S. at 773) whereby the union members who wished to engage in political speech through their union must bear the entirety of that expense, but may not on that account be required to bear in addition a portion of the dissentors' share of other expenses. If, in determining the proportion of political (or other nonchargeable) expenditures to the union's total budget a "clear and convincing evidence" burden were imposed on the defendant union, there would be a greater risk that the nonobjectors would have to pay a share of those costs properly chargeable to the objectors.

either is permissible and the "balance of interests in this case warrants use of the preponderance standard." *Id.*

While we believe the foregoing is dispositive, it is also true that even where a "transcendent" First Amendment interest is only on one side, none of this Court's decisions cited at Pet. Br. 29-31 declare a "clear and convincing evidence" standard of proof for establishing the facts.[29] Several of those cases decided the pure issue of law whether claimed First Amendment rights are outweighed by other interests.[30] Questions of the standard of proof were addressed only in *Speiser v. Randall*, 357 U.S. 513, *Freedman v. Maryland*, 380 U.S. 51 and *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546. We unhesitatingly accept those precedents, but they do not aid petitioners. In each the Court prescribed the standards for performing a uniquely sensitive task—not remotely involved here—of ascertaining "the line between speech constitutionally guaranteed and speech which may legiti-

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[29] Petitioners have advisedly abandoned their reliance (Pet. for Cert. 18-19), on *Gertz v. Robert Welch, Inc.*, 418 U.S. 323. *Gertz* did articulate the requirement that in defamation actions plaintiffs who are *public* officers or *public* figures must establish malice by "clear and convincing proof". 418 U.S. at 342. However, disagreeing with the plurality opinion in *Rosenbloom v. Metromedia*, 403 U.S. 29, the *Gertz* Court ruled that *private* individuals suing for defamation need not establish by clear and convincing evidence that the defamatory statement was made with knowledge of its falsity or in reckless disregard for the truth. 418 U.S. at 345-346. The Court did so while holding that defamation suits by private individuals *are* subject to the "constitutional commands of the First Amendment" (*id.* at 349) and imposing other limitations on such suits (*id.* at 347-350). Thus *Gertz* demonstrates that "clear and convincing proof" is not a general requirement in First Amendment litigation, but is an element of the constitutional standard declared in *New York Times Co. v. Sullivan*, 376 U.S. 254. The ruling of the Master in *Beck v. CWA*, 112 LRRM 3069, 3073 (D. Md.) (Pet. Br. 29) was mistakenly based on the plurality opinion in *Rosenbloom*.

[30] That balance has already been struck for this case by *Hanson* and *Abood*, *see* pp. 8-9, 22-24, *supra*.

mately be regulated, suppressed, or punished [, a line which] is finely drawn." *Speiser*, 357 U.S. at 525; see also *Freedman*, 380 U.S. at 58; *Southeastern Promotions*, 420 U.S. at 559-560. Even in those cases the Court held only that the burden of proof rests with the party that seeks to suppress speech; none required that this burden be met by "clear and convincing evidence".[31] This is especially harmful to petitioners' argument, because *Freedman* and *Southeastern Promotions* involved prior restraints, which are strongly disfavored, but to which petitioners are not subject.[32]

Indeed, petitioners' thesis that a party asserting a First Amendment right is entitled to require that the opponent's case be established by clear and convincing evidence is squarely refuted by *Mt. Healthy City Board of Ed. v. Doyle*, 429 U.S. 274. That case involved the respective burdens of a public employee who claims that he has been penalized for engaging in conduct protected by the First Amendment and those of his public employer. The Court summarized its holdings as follows:

> Initially, in this case, the burden was properly placed upon respondent to show that his conduct was con-

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[31] Because both the majority and the dissenters have equal First Amendment rights, these cases do not bear on the allocation of the burden of proof, the issue put aside at p. 42, n.27, *supra*.

[32] Petitioners are not being prevented from speaking or associating with whomever they please. They are required to pay money, some portion of which is being used for purposes to which they arguably cannot be required to contribute. "Historians may find hyperbole" (cf. *Jones v. SEC*, 298 U.S. 1, 33 (Cardozo, J., dissenting)) in the petitioners' suggestion that they would be subjected to prior restraint such as brought forth Milton's *Aeropagitica*, and the judgments in cases like *Near v. Minnesota*, 283 U.S. 697, and *New York Times v. United States*, 403 U.S. 713, even if the judgment below left BRAC free to collect the full dues from petitioners and to reimburse them after a calculation of the amount which the unions may not retain. In any event, the district court's judgment protects petitioners against having to pay whatever proportion of their dues is not properly chargeable. See pp. 9-11, *supra*.

> stitutionally protected, and that this conduct was a "substantial factor"—or, to put it in other words, that it was a "motivating factor" in the Board's decision not to rehire him. Respondent having carried that burden, however, the District Court should have gone on to determine whether the Board had shown by a preponderance of the evidence that it would have reached the same decision as to respondent's reemployment even in the absence of the protected conduct. [429 U.S. at 287, footnote omitted]

That decision is contrary to petitioners' present contention in two respects: First, an employee who has proven that he had exercised a First Amendment right nevertheless bears also the burden of proving that this conduct was a motivating factor for the employer's adverse action. Thus, there is no general rule that the burden of proof may not be imposed on the party whose First Amendment rights are at stake. Second, even where the employee has met the burden, the employer may yet prevail if he establishes by a *preponderance of the evidence* the defense that the adverse action would have been taken even in the absence of the protected conduct. Accord: *Givhan v. Western Line Consol. School Dist.*, 439 U.S. 410, 416. If petitioners' theory were correct, only clear and convincing evidence would be sufficient.

(b) As noted previously, petitioners are not content to impose a "clear and convincing evidence" standard of proof on the defendants but insist that their standard is satisfied only by what they describe as "records maintained in accordance with generally accepted accounting principles" (Pet. Br. 27). Since as we have just shown, petitioners' standard-of-proof argument is without merit, its accounting corollary also fails.[33] We nevertheless feel

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[33] Petitioners say "BRAC admittedly owed plaintiffs 'a fiduciary obligation not to misspend dues receipts . . .'" (Pet. Br. 27). Defendants have never conceded, and dispute, that they owe a fiduciary duty to objecting employees as such; those employees are owed only whatever statutory duties are declared by § 2 Eleventh of the RLA. In the sentence from a BRAC brief, of which petitioners

called upon to respond to petitioners' arguments concerning accounting, because these arguments contain gross distortions of the record, and culminate in an ill-concealed attack on what this Court decided in *Allen*, a matter of intense practical importance.

i. Petitioners' repeated assertion that BRAC's accounting records do not satisfy generally accepted accounting principles is contrary to the findings of the district court. That court after a lengthy trial, which focused on those records and testimony concerning them,[34] accepted this evidence as establishing the percentage of BRAC's total expenditures which was attributable to categories not chargeable to petitioners under ¶ 22 of that court's earlier ruling. See pp. 3-5, *supra*. Petitioners' "accounting standards" objection to those findings misunderstand the judicial function. Although the Union's

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quote a fragment, the Union was referring to its fiduciary obligation, under 29 U.S.C. § 501(a), to all the members of the Union *as a group*. (Indeed, since the *Ellis* plaintiffs are nonmembers, this fiduciary obligation does not apply to them at all.) There is nothing in § 501(a) which requires any particular form of accounting records, and there is no claim in this case that the defendants have not fully complied with the financial reporting and disclosure requirements of 29 U.S.C. §§ 431 *et seq.* Petitioners' further references are to the pleadings, wherein BRAC *admitted* that it is subject to a "fiduciary" duty of fair representation, but *denied* the allegations that this duty was breached by BRAC's uses of dues. In their petition for certiorari and their brief on the merits petitioners have relied exclusively on § 2 Eleventh of the RLA and the First Amendment.

[34] Defendants' witnesses produced innumerable payment vouchers, audits and other documents (CR 291 Ex. F-M, AF-AM, AP-AW, BB-BM, BT-BZ). They described in great detail the work of individual units and subdivisions of the Union (RT 15-64, 165-231, 314-53, 371-89, 428-64, 488-517, 591-648, 718-33, 774-800, 883-909). They testified to the amounts of time spent by them and their subordinates on various functions (e.g., RT 28-64, 171-88), testimony confirmed by examination of their daily schedules, correspondence, telephone calls (e.g., RT 29-30, 884, 892-93, 897-98).

books do not group its records along ¶ 22 lines, *there are records for every Union disbursement.* In receiving those records and the supporting testimony the trial court determined damages by the traditional judicial process. Plaintiffs were at liberty to cross-examine or attempt to contradict defendants' evidence, and their plea that this traditional process is inadequate to determine Union expenditures finds no support in logic, in law, or in experience. Moreover, the court of appeals unanimously affirmed the district court's ruling on the accounting issue. Pet. App. 7a-8a, 14a. Petitioners' one-sided description of the evidence (Pet. Br. 27-29) cannot remotely satisfy its heavy burden under the "two-court rule" in asking this Court to overturn the finding that these records were sufficient to support the district court's conclusions concerning the proportion of ¶ 22 expenditures. See, *e.g.*, *United States v. Reliable Transfer Co.*, 421 U.S. 397, n.2 and cases cited.[35]

In the end, petitioners' criticism of BRAC's accounting methods is seen to be an ill-disguised effort to secure the overruling of what the Court decided in *Allen* with respect to accounting:

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[35] In a desperate effort to buttress their attack on BRAC's accounting system petitioners charge that the Grand Lodge and AFL-CIO COPE "colloborated to 'launder' $100,000, illegally channeling funds of union members and agency fee payors into the campaigns of political candidates endorsed by the AFL-CIO." (Pet. Br. 27). The evidence cited by plaintiffs shows that the transactions to which petitioners refer worked a result opposite to what petitioners allege: BRAC gave up political money voluntarily donated to its separate segregated fund (See *FEC v. National Right to Work Committee*, —— U.S. ——, 51 L.W. 4037, 4038 (Dec. 13, 1982)), and received union treasury money whose use is politically restricted and covered by BRAC's political rebate plan. Contrary to Pet. Br. 27, their accountant's "analysis" has been "refuted" four times previously (A. 254, 363, RT October 23, 1979 at 1326-27, A. 400). Moreover, the "documentation" on which that analysis rests was excluded by the district court (RT Aug. 11, 1978 at 1250-51), a ruling petitioners have never challenged but have simply ignored in three courts.

> Absolute precision in the calculation of such proportion [of political to total union expenditures] is not, of course, to be expected or required; we are mindful of the difficult accounting problems that may arise. [373 U.S. at 122][36]

Petitioners assert that *Allen* "has been misinterpreted as having condoned whatever accounting practices a union finds convenient." Pet. Br. 31.

As we have shown, this cavalier criticism of the courts below is entirely unjustified. Petitioners have failed to identify even a single error in the voluminous books and records introduced and relied upon by BRAC at the trial. And the courts below were entirely correct in rejecting petitioners' position, reiterated here, that BRAC should have kept its accounting records according to categories of expenditures whose possible legal relevance did not even appear until the district court made its ¶ 22 ruling, and which will prove to be irrelevant if the judgment of the court of appeals reversing the district court's ¶ 22 ruling is affirmed. *Allen* makes this plain. The Court there reaffirmed *Street*'s holding that political expenditures are not chargeable to objecting employees, and directly confronted questions of proof and accounting as those questions bear on the relief to which objectors are entitled, and the Court did *not* determine that the plaintiffs were entitled to an order requiring the defendant unions henceforth to treat political expenditures separately in their accounts. Thus, *Allen* leaves no room for petitioners' contention that the proportion of chargeable expenditures can only be proven by accounting records that anticipate this Court's determinations of what expenditures are not chargeable to objecting employees.

Petitioners, for good reason, are careful not to articulate the consequence of their position. Since the rec-

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[36] *Allen* thus comports with the common sense of cost accounting: "Allocation of costs is not a matter for the slide-rule. It involves judgment on a myriad of facts. It has no claim to an exact science." *Colorado Interstate Co. v. Comm'n*, 324 U.S. 581, 589.

ords upon which petitioners insist do not exist, under their rule of law, the Union would be disabled from proving what proportion, if any, the challenged expenditures bore to its total budget. By creating this artificial requirement as to the nature of the evidence a union must produce, petitioners would render the union's burden under *Allen* insuperable, with the result that the objecting employees would recover their entire dues. *And this would follow even if only a single one of the expenditure categories at issue here were determined to be non-chargeable.* This of course is irreconcilable with *Allen*.[37]

## CONCLUSION

For the reasons stated above, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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[37] Petitioners well understand this to be the consequence of their position. For example, they now say that they "do not contend that all expenses of BRAC conventions are non-chargeable" but "do contend that they can be charged only their proportionate share of convention costs which are proven to be directly related to collective bargaining with Western Airlines" (Pet. Br. 20). They say further that "BRAC did not meet its burden of establishing Western Airlines collective bargaining costs [at the convention]" (Pet. Br. 22), by which they mean, as the burden of proof portion of their brief shows, that BRAC did not produce "accounting records which isolate the costs of collective bargaining with Western Airlines" (Pet. Br. 27). This would, of course, be an impossible task. How, for example, would accounting records allocate the costs of electing union officers to each of the employers with which BRAC bargains?